

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 INTEL CORPORATION, :
4 Petitioner :
5 v. : No. 02-572
6 ADVANCED MICRO DEVICES, INC. :
7 - - - - -X
8 Washington, D. C.
9 Tuesday, April 20, 2004
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:04 a.m.
13 APPEARANCES:
14 SETH P. WAXMAN, ESQ., Washington, D. C. ; on behalf of the
15 Petitioner.
16 CARTER G. PHILLIPS, ESQ., Washington, D. C. ; on behalf of
17 the amicus curiae, supporting the Petitioner.
18 PATRICK LYNCH, ESQ., Los Angeles, California; on behalf of
19 the Respondent.
20 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D. C. ; on
22 behalf of the United States, as amicus curiae,
23 supporting the Respondent.
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7	supporting the Petitioner	16
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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
next in No. 02-572, the Intel Corporation v. Advanced
Micro Devices.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN
ON BEHALF OF THE PETITIONER

MR. WAXMAN: Mr. Chief Justice, and may it
please the Court:
28 U.S.C., section 1782 authorizes discovery for
use in a proceeding in a foreign or international
tribunal, upon application by an interested person. Those
are words of indeterminate scope. No one in this case
contends that they should be applied to the limits of
definitional possibility, that words like interested
person, for use in, proceeding require a contextual
interpretation, and the context in this case is comity in
discovery. As -- in language that everyone in this case
quotes, the 1964 Senate report characterized the statute
as for the purpose of, quote, adjusting U.S. procedures to
the requirements of foreign practice and procedure.

And with respect to the question presented in
this case, there are three salient, completely undisputed
facts.

1 Number one, EC law denies an antitrust
2 complainant any discovery rights for anything at any stage
3 of the proceeding however long or short it may go.

4 Number two, if AMD had filed its complaint with
5 the Antitrust Division of the Justice Department or the
6 FTC, it would likewise have no discovery rights
7 whatsoever.

8 And third, the EC, which can obtain these
9 documents directly from Intel, has not only declined to do
10 so in this case, but has unequivocally represented to this
11 Court that permitting parties that file complaints with
12 it, thereby to invoke section 1782, will interfere with
13 its governmental functions.

14 QUESTION: Mr. Waxman, I -- I -- it seems to
15 make a lot of sense, but I need a -- I need a -- a hook to
16 hang it on. I need some language in that text which --
17 which would enable me to say, oh, it means you only get
18 discovery when there would have been discovery in the
19 foreign proceeding. But I -- I don't -- I don't see any
20 language that gets me anywhere near that.

21 MR. WAXMAN: Justice --

22 QUESTION: You can fall back, I suppose, on --
23 on guided discretion until, you know, we can tell the
24 lower courts never to do it unless it's available in
25 foreign -- but I don't see it in the language.

1 MR. WAXMAN: Justice Scalia, I'm -- I'm
2 confident that our successive briefs in this case provide
3 a number of hooks, but I'm going to give you one or two
4 that I think are particularly applicable with respect to
5 textual interpretation, although obviously we also would
6 urge the Court, because this is a procedural statute, not
7 one that grants substantive rights, that it can and must
8 announce general rules of supervisory power that outline
9 where a -- where discretion ends and abuse begins because
10 another operative word in the statute is may.

11 But since we're talking with text, let's look,
12 for example, at the word, interested person. The
13 innovation of the statute is it said, okay, you can grant
14 discovery either pursuant to a letter rogatory, et cetera,
15 et cetera, which is the ordinary way in which
16 international discovery is invoked by foreign tribunals or
17 foreign sovereigns, or by an interested person. Now, no
18 one in this case says that interested person should be
19 given its plain meaning, otherwise we would have
20 essentially a universal private freedom of information
21 act. And so --

22 QUESTION: I understand that. But I am looking
23 or a word in here that -- that similarly requires you to
24 decide whether the foreign court itself would allow
25 discovery.

1 MR. WAXMAN: Well, we -- we think --

2 QUESTION: Which is -- which is the -- the major

3 point you were addressing.

4 MR. WAXMAN: Yes.

5 QUESTION: I don't see any -- any --

6 MR. WAXMAN: Everybody will come -- everybody

7 who argues today will give you some definition of what

8 interested person is, and none of them are the limits of

9 definitional possibility. So you've got to give it a

10 construction that is consistent with the history and

11 purpose of the statute.

12 QUESTION: Why not at least a complainant? I

13 mean, the person who is seeking the discovery here is the

14 complainant, the one who comes to the commission and says

15 investigate.

16 And I understand your third point. Your first

17 two points puzzle me because there is no counterpart in

18 European schemes to our out-of-court discovery. It

19 doesn't exist. It all takes place under the control of

20 the court and the direction of the court. And on the

21 other hand, the -- the animal that the EC antitrust unit

22 is is nothing like our Antitrust Division where the -- we

23 don't have that blending. You don't have a complainant

24 who has a right before that commission to submit evidence,

25 to be present at their -- if they -- if they do have a

1 hearing. We don't have a complaining party before the
2 Antitrust Division that has a statutory right to be
3 present at a hearing. So you -- the -- the systems are
4 different and you can't compare them on both points.

5 MR. WAXMAN: To be -- to be sure -- to be sure,
6 Justice Ginsburg. And you will hear -- you know,
7 everybody has their own favorite contextual interpretation
8 of words like interested person or for use in. But the
9 context of this statute is discovery, and the purpose, as
10 made pellucidly clear, is to reduce the significance of
11 international boundaries in discovery. And therefore,
12 what we say, with respect, is you should read interested
13 person to mean an entity that has at least some discovery
14 rights to something at some stage of the process, whether
15 it's pending or imminent or reasonably foreseeable.

16 QUESTION: Some -- some discovery rights in this
17 country?

18 MR. WAXMAN: In -- in the foreign country, that
19 is, for the foreign sovereign who's being assisted.

20 Now -- now, AMD suggests that oh, no, no, no,
21 no. Another purpose of the statute was the imperial
22 export of, quote, liberal American discovery rules. Now,
23 we think that's wrong, but even if it were right, it would
24 be unavailing in this case because it is undisputed that
25 if they had filed a complaint with any of the antitrust

1 regulatory authorities here, they would be entitled to no
2 discovery whatsoever. And therefore, at least you ought
3 to interpret interested person to mean a private entity
4 that has no discovery rights whatsoever either in the
5 foreign proceeding or would have it here.

6 I mean, the very premise of, quote, liberal
7 American discovery is that it is available when a private
8 party undertakes the obligations of being a litigant.
9 That is, you file a -- you can't get discovery based on
10 some speculation that you have a lawsuit. You get
11 discovery when you undertake the obligations consistent
12 with rule 11 of pleading a case. And what they are trying
13 to do -- there is no case, reported case, decided by any
14 court in the long history of this --

15 QUESTION: But even so, if you take a typical
16 civil law proceeding a -- between private litigants, you
17 can't go out and get discovery on your own. The court has
18 to authorize it, and the order for discovery will come not
19 from a subpoena that you sent as a private party. It's
20 just -- they don't -- so if we were to interpret it your
21 way, then you would say, well, that no private party in a
22 civil law system that doesn't know from pretrial
23 discovery, doesn't have anything like pretrial discovery,
24 could never get any documents, could never get any
25 testimony.

1 MR. WAXMAN: Justice Ginsburg, I -- I think -- I
2 mean, I think this Court ought to announce that since the
3 manifest purpose of the statute is to assist, quote,
4 foreign tribunals and litigants before those tribunals,
5 that the indeterminate words of the statute should be read
6 in that context. But even if you wanted to say that
7 discovery would be available at least on a discretionary
8 basis, to someone who has some discovery rights somewhere,
9 if they were to file this type of action in some place,
10 that would also be useful to the lower courts.

11 And there -- it is simply irrational to say that
12 a statute that was enacted in order to reduce the
13 significance of international boundaries would create this
14 giant loophole that creates ubiquitously universally
15 unavailable discovery, just because somebody has --
16 happens to bring an administrative complaint in one
17 country and seeks to receive documents that are available
18 in this country when he or she couldn't have received them
19 if he had sued here and where the foreign, quote, tribunal
20 has stated as a categorical matter that resort to section
21 1782 by complainants before it will affirmatively
22 undermine its sovereign governmental processes.

23 QUESTION: What happens when AMD goes to the
24 court of first instance, disappointed with what the EU
25 commission or that the EU committee has done, and then it

1 goes to the court of first instance? Can that court of
2 first instance in its discretion order any discovery?

3 MR. WAXMAN: I believe, Justice Kennedy, that
4 the answer to that question is no. I'm sure that Mr.
5 Phillips, on behalf of the EC, will be able to correct me
6 if I'm wrong. But whether it can --

7 QUESTION: I'm sure he'll -- I'm sure he'll be
8 glad you asked him to do that.

9 (Laughter.)

10 MR. WAXMAN: Well, I'm giving him at least 15
11 minutes advance -- 10 minutes advance warning.

12 The point here, I think, in response to your
13 question, Justice Kennedy, as whether it could or couldn't
14 is a feature of a sovereign determination by the countries
15 that make up the European Community. If discovery is
16 available in that proceeding, there's no doubt that's a
17 court proceeding and that's a proceeding before a
18 tribunal. And whatever discovery rights --

19 QUESTION: But I'm talking, Mr. Waxman --

20 MR. WAXMAN: -- whatever --

21 QUESTION: Mr. Waxman --

22 QUESTION: That's -- that's why I asked and it
23 would seem -- let's assume that the court of first
24 instance could order and in the usual course would order
25 some sort of discovery. Would that change your case here?

1 MR. WAXMAN: It -- it wouldn't at all. If it
2 could, then, you know, a 1782 request could be made in the
3 unlikely event that the EC or the court couldn't simply do
4 what it can do now, which is order Intel to produce the
5 documents. I mean, that's -- that's the jarringly
6 anomalous result that they're seeking.

7 QUESTION: Mr. Waxman, I thought it was clear
8 that the court proceeding is a review of the record as it
9 comes to the court from the commission, that is, that the
10 only proof-taking stage is before the commission and that
11 the EC courts, both the tribunal of first instance and the
12 ECJ, review on the record that exists. They don't take
13 any proof.

14 MR. WAXMAN: I believe that's correct, and our
15 -- they call -- they say that this puts them in a, quote,
16 Catch-22 or a conundrum, but it does nothing of the sort.
17 The question before the court of first instance may be --
18 and this is assuming a lot of speculative things
19 including, among others, that they are disappointed with
20 what the EC does and that the EC doesn't do what it could
21 do any day, including this afternoon, which is order Intel
22 to produce these documents, but assuming documents aren't
23 produced and the EC decides, as we fervently hope, not to
24 proceed against Intel and -- and they decide that it's
25 worth it to go to the court of first instance and the

1 review will only be on the record that the EC compiled,
2 under European Community law ipso facto the question would
3 be whether or not the EC or DG compounded in declining the
4 request to obtain these documents.

5 I mean, you -- we -- we don't have a proceeding
6 -- let's say in a -- just a regular lawsuit in the United
7 States. I'm -- you know, Intel is suing AMD. Intel wants
8 certain discovery. AMD objects. The judge says, I'm not
9 going to grant that discovery. I don't really think
10 that's necessary. We don't have a procedure. You'd be
11 laughed out of court if you came in and said, well,
12 nonetheless, we want it produced so that if we lose before
13 this court proceeding and we go up on appeal, we'll be
14 able to argue not only that the district judge abused his
15 discretion in denying discovery, but we want to be able to
16 show what those documents would say. I mean, nobody has
17 such a procedure.

18 And to the extent that there's any, quote,
19 conundrum here -- and frankly, I don't see it -- it's a
20 conundrum that is the result of the way that the European
21 Community has chosen to organize its processes.

22 QUESTION: I think the -- the difficulty is --
23 is, well, what are the rules. What you say sounds as if
24 it makes a lot of sense, but there are three aspects to
25 the case.

1 Starting backwards is, can a private party bring
2 this? The answer is yes. You agree it's yes. But you
3 want to say not always. So then you have a rule that
4 you've just enunciated now of who definitely couldn't.

5 And as to the second, I guess -- I mean, I'm not
6 sure that's the right rule, frankly. Maybe we'd figure
7 that out. Maybe it is.

8 The second part. I found an opinion by Justice
9 Ginsburg where she has a rule which is in the D.C. Circuit
10 which says about how close it has to be in time, and my
11 guess is that you will say that's okay, but I'd be
12 interested if you don't.

13 And as to the first part about, well, yes, we
14 agree this is a person who can get discovery, but not
15 here, now, there I don't see any rule at all. So I'd like
16 to know your views on that.

17 MR. WAXMAN: Well --

18 QUESTION: I mean, you want to follow their --
19 all right.

20 So my two questions are, is Justice Ginsburg's
21 approach to the time problem okay with you?

22 MR. WAXMAN: No. We think --

23 QUESTION: No. All right.

24 MR. WAXMAN: -- that insofar -- well, we think,
25 first of all, as the EC has explained, there is no

1 proceeding before a tribunal and there won't be unless and
2 until one of these two parties ever decides to go to the
3 European --

4 QUESTION: Well, that -- her quote --

5 MR. WAXMAN: And --

6 QUESTION: Let me -- I better quote this. It
7 says you have to have to get this discovery reliable
8 indications of the likelihood that proceedings will be
9 instituted within a reasonable time.

10 MR. WAXMAN: Right.

11 QUESTION: Now, you might win under that for the
12 very reason you state.

13 MR. WAXMAN: I think we certainly would win
14 under it. We think on balance that when the request is
15 made by a private party, not a foreign sovereign or
16 tribunal, that the request should be made by somebody who
17 is a litigant in pending litigation but that at the most,
18 if the court were to say, well, okay, even in the context
19 in which there is a private who's not even a litigant yet,
20 we're going to allow discovery to be obtained where
21 litigation is, as the Second Circuit has said, imminent,
22 that is, reasonably likely to occur and reasonably soon to
23 occur, because otherwise discovery by private parties,
24 prior to the -- the initiation of any proceedings before a
25 tribunal is ubiquitously unavailable unlike the context

1 of, for example, an investigating magistrate or a criminal
2 prosecutor where it almost always is universally
3 available, and the 1996 amendment to the statute reflects
4 that.

5 QUESTION: Do you have any explanation for
6 elimination of the word pending from the statute?

7 MR. WAXMAN: No, and particularly since the
8 legislative history -- the language of the legislative
9 history that explains the statute continues to use it, it
10 seems to me that what they -- what they -- it most likely
11 reflects the fact that they wanted to include the French
12 investigating magistrates -- and I won't mangle the
13 language by trying to give the French pronunciation --
14 where it was arguable whether that was or wasn't a
15 tribunal. They wanted to -- to cover it and therefore
16 pending wouldn't necessarily have been required in that
17 context.

18 But I don't think -- there is not a shred of
19 evidence that when Congress considered this statute at any
20 point in its legislative development, it ever considered
21 -- and it had no reason in the cases to ever consider --
22 an outlandish request where a private party that doesn't
23 have any discovery rights at this stage anywhere in any
24 country no matter where it files such a complaint would
25 thereby get them as a windfall by means of this

1 anachronism

2 May I reserve the balance of my time?

3 QUESTION: Very well, Mr. Waxman.

4 Mr. Phillips, we'll hear from you.

5 ORAL ARGUMENT OF CARTER G. PHILLIPS

6 ON BEHALF OF THE AMICUS CURIAE, SUPPORTING THE PETITIONER

7 MR. PHILLIPS: Thank you, Mr. Chief Justice, and
8 may it please the Court:

9 Justice Kennedy, the answer to your question is
10 that the court of first instance does not have the
11 authority to order discovery.

12 But Justice Ginsburg, the answer to your
13 question is that the court of first instance does have the
14 authority to say, in response to an argument made by AMD,
15 that we have not adequately explained why we didn't take
16 that information into account. And we know from the
17 briefs that AMD has a pretty good idea what that
18 information entails and therefore would be in a perfectly
19 adequate position to go first, obviously, to the
20 commission and say this is why we want you to consider
21 this information.

22 And then second, in the event that we were to
23 issue a refusal to go forward with the proceeding, which
24 we have to explain, frankly, in quite excruciating detail,
25 that's then subject to very much plenary review by the

1 court of first instance and ultimately the Court of
2 Justice.

3 QUESTION: And the court of first instance can't
4 expand the record.

5 MR. PHILLIPS: No. The court of first instance
6 does not expand the record. It, like our Federal courts
7 reviewing agency decision-making, has the authority to
8 send the matter back to the agency to review the question
9 a second time.

10 QUESTION: Where does this proceeding stand now?
11 I mean, this is a discovery request and it's pretty --
12 it's been pending pretty long. Has the commission made no
13 preliminary determination?

14 MR. PHILLIPS: The commission has not made a
15 preliminary determination. I think it's important to put
16 it in context. This is a -- an abuse of monopoly power
17 claim based on a large number of contracting arrangements
18 between Intel and a lot of its customers. And the
19 question -- and so there's a serious question of having to
20 review a lot of market data in order to determine whether
21 or not there appears to be a pattern of abuse or a problem
22 that's worthy of going forward with.

23 So the commission has for some time been taking
24 a very hard look at the nature of the market, has
25 obviously talked to AMD, has talked to Intel. I think

1 that's an important aspect of this case that the Court
2 ought to have in mind, is that -- and -- and it's part of
3 the comity concerns that I think ought to animate the
4 Court's analysis of this problem. The commission has an
5 orderly process and that process may, at some day, require
6 it to ask Intel to provide these particular documents or
7 other documents. We don't know.

8 But what we don't want frankly is for a private
9 entity to run to a United States court and use essentially
10 the commission as a pawn in an effort to obtain pre-
11 complaint discovery. That's pre-complaint both pre in the
12 United States complaint and pre-complaint in the -- before
13 the European Commission. If at some point in the future
14 we need assistance, we know how to obtain that assistance
15 on our own. We don't require, quote, interested parties
16 to do so.

17 In our -- in our assessment of the case and --

18 QUESTION: How does that fit in the rule then?
19 I mean, what kind of -- what kind of a rule of law is it?
20 I mean, what do you -- how do you fit that in?

21 MR. PHILLIPS: We -- we --

22 QUESTION: Do you say if the commission doesn't
23 want it, then don't give it to them, but if they do want
24 it, do? How does this fit?

25 MR. PHILLIPS: Well --

1 QUESTION: How do you interpret the statute to
2 get the result that you're arguing for?

3 MR. PHILLIPS: Let me give you a preliminary
4 answer and then I'll tell you -- the -- the real answer as
5 how -- we would interpret it through the word tribunal.
6 That's the statutory hook that the commission feels most
7 comfortable with.

8 QUESTION: Well, with a tribunal you -- I don't
9 think it is a tribunal probably, but I'll hear more on the
10 other side. But still, there is a tribunal in the offing
11 and that's the tribunal that will be there if the
12 commission decides to enforce this.

13 MR. PHILLIPS: To be sure, Justice Breyer. But
14 the Ninth Circuit's decision was based on an assessment
15 that the preliminary actions taken by the commission in
16 this particular case are such that render us a tribunal
17 within the meaning of the statute, which was the explicit
18 basis on which the court of appeals ordered this
19 information to be evaluated at least on remand by the
20 district court. And -- and our position is, at least to
21 the extent that this Court is going to adopt an -- an
22 approach akin to that by Judge Friendly in the Second
23 Circuit opinion involving the Indian tax collectors, which
24 looks to see whether or not the adjudicative function is
25 distinct from the investigative functions, our answer

1 would be that we are not that kind of a tribunal. We --
2 everything we do is investigative. We do not perform --

3 QUESTION: That would do it, but they have -- I
4 think they have the alternative ground here, that even if
5 you're not a tribunal, the Ninth Circuit says it could
6 lead to a proceeding in the court of first instance.
7 Don't they say that somewhere in their opinion?

8 MR. PHILLIPS: They make that argument, but that
9 would be an alternative theory.

10 QUESTION: All right. So as long as they make
11 that argument, then I can't say, okay, I've got the result
12 there that -- that they're arguing for, assuming you're
13 right, that -- that just by using this thing about the
14 tribunal.

15 MR. PHILLIPS: Well --

16 QUESTION: All right. Now, so -- so what else
17 could we use to get to your desired end with this statute?

18 MR. PHILLIPS: Well, the -- the next step,
19 obviously, and it's not one that the commission argues for
20 specifically, but it's one that -- that Intel makes, which
21 is that even if -- if you're going to use the court as the
22 ultimate tribunal, then what is the nexus between this
23 request for information and a proceeding before that
24 court. That's so far off into the future. It certainly
25 implicates the earlier D.C. Circuit opinion by Justice

1 Ginsburg, et cetera.

2 QUESTION: I assume that the EU committee would
3 be a tribunal under the first sentence if it asked for the
4 documents.

5 MR. PHILLIPS: No, it would not regard itself as
6 a tribunal under those circumstances. If we wanted these
7 documents, we -- we would seek them either directly from
8 the parties or through some other mechanism. This is not
9 a mechanism that the -- that the commission itself views
10 as available to it to seek documents. We would go through
11 government officials. We would go to the FTC. We would
12 go to the Department of Justice to seek information. We
13 might go to our -- our member countries to seek
14 information, or we would go to parties over whom we have
15 direct jurisdiction to seek information. But 1782 is not
16 a provision that the commission views itself as -- views
17 as available to it, nor does it want to be used as a pawn
18 by -- by private entities seeking to employ its processes
19 as a mechanism to obtain pre-trial -- pre-complaint
20 discovery that's available under no other circumstances.

21 The -- the over-arching argument that the
22 commission would like the -- the Court to take away from
23 this is -- is a question of if you have to decide on a
24 contextual basis, because the language of the statute is
25 not unambiguous and therefore you have to come up with

1 some limiting principles, the commission urges the Court
2 to recognize that the use of discovery in this -- the use
3 of this statute in this particular way is a direct
4 interference. It risks the release of confidential
5 information. It increases the burden on the commission
6 and the workload that it has, and it allows us to
7 unseemingly -- unseemingly being used -- unseemly being
8 used as a pawn in this kind of -- in this kind of an
9 effort at discovery. And we would ask --

10 QUESTION: How does it increase the commission's
11 workload?

12 MR. PHILLIPS: Well, it -- it --

13 QUESTION: In the sense that you look at it if
14 they give it to you?

15 MR. PHILLIPS: In that sense and it also
16 provides an incentive.

17 QUESTION: Why -- why don't you just say we're
18 not going to look at --

19 MR. PHILLIPS: It -- it provides an incentive
20 for more filings with the commission in order to use this
21 device in order to obtain discovery that you otherwise
22 could not get. And I think there's good reason to suspect
23 that it may be used. Certainly if this Court were to
24 uphold what AMD attempted to accomplish here, I would be
25 quite worried about other plaintiffs in future cases using

1 this particular device.

2 And remember, there are no rule 11 sanctions
3 that are available for a filing with the European
4 Commission. You don't have to be a lawyer to file a
5 complaint with the European Commission. It requires a
6 relatively minimal amount of effort. It's a letter that
7 identifies a particular problem and asks the commission
8 then to go forward and take a look at it. Therefore, it's
9 a -- it's essentially a costless exercise by plaintiffs
10 using the commission, I submit, in a way that I would hope
11 the Court would find inappropriate and therefore ought to
12 resolve the ambiguities, whether you do it on the basis of
13 tribunal or for use of or proceeding -- and the commission
14 would not presume to tell this Court how to interpret the
15 language of its statute, but whatever choice you make,
16 whichever statutory hook you look for, the commission
17 would ask that this Court interpret the statute narrowly.

18 QUESTION: What about the one that comes up in
19 the reply brief? And it -- and this is Intel's brief. So
20 I'm wondering if the commission shares the view that 1782
21 is meant to deal with procuring evidence in the United
22 States from a third party, not from the party before the
23 commission, not from Intel because the commission can tell
24 Intel you give -- give us these documents. But it must
25 refer to people who are not before the court.

1 MR. PHILLIPS: Yes, well, the commission is
2 certainly supportive of that notion because the commission
3 believes that when and if it needs these -- this
4 information, it will be able to obtain it directly from
5 the party. That is the easiest undertaking in order to
6 obtain information that the commission has available to
7 it. So to the extent the Court wants to draw that line,
8 certainly the commission would be quite comfortable with
9 that line. Again, of course, the commission is
10 uncomfortable telling you how to decide the case -- the
11 statutory -- the specific statutory language.

12 Let me just -- one last point. The last thing
13 in the world the commission really wants is to have 800
14 district courts deciding this issue on a case-by-case
15 basis exercising their discretion. It seems to us that
16 that is an intolerable burden to impose on the commission.
17 It cannot monitor all litigation in the United States in
18 order to make its interests and concerns known. And,
19 therefore, it is terribly important that this Court
20 announce a rule, either as a supervisory matter or as a
21 matter of statutory construction, that will limit the
22 ability of the commission to be used, as I say, as a pawn
23 in this discovery effort.

24 QUESTION: What -- what's our authority to
25 announce a supervisory rule? What's your best case for

1 that?

2 MR. PHILLIPS: Oh, geez. I don't -- off the top
3 of my head -- I mean, the commission didn't examine it --
4 that particular issue specifically, Justice Kennedy. I'm
5 -- I'm hoping that my colleague in rebuttal will be able
6 to give --

7 QUESTION: Interpretation of what comity
8 consists of in this instance.

9 MR. PHILLIPS: Well, the -- the comity principle
10 are the cases like *McCulloch* and the -- and the -- that we
11 cited in the brief, and obviously *Charming Betsy*. I mean,
12 those are rules of interpretation that we have, but that's
13 not -- that doesn't answer Justice Kennedy's specific
14 question.

15 QUESTION: Thank you, Mr. Phillips.

16 Mr. Lynch, we'll hear from you.

17 ORAL ARGUMENT OF PATRICK LYNCH
18 ON BEHALF OF THE RESPONDENT

19 MR. LYNCH: Mr. Chief Justice, and may it please
20 the Court:

21 I'd like to underline three points.

22 First of all, the question of the EC's comity
23 concerns. Those concerns deserve respect, but
24 emasculating section 1782 is not the proper way to respect
25 those concerns. Privilege is really the right answer to

1 the EC's concerns and the right answer to counsel's last-
2 expressed concern about 800 district judges reaching
3 different conclusions in different cases.

4 As to the second question, whether or not this
5 is a proceeding before a tribunal, which seems to be the
6 heart of this case, when Congress enacted or amended
7 section 1782 in 1965, it is absolutely clear that Congress
8 intended to extend the rights granted under section 1782
9 to proceedings in foreign countries that were quasi-
10 judicial and administrative in nature. And it is also
11 quite clear that Congress did not know and did not
12 consider it necessary to know all the different shapes and
13 forms that administrative law might take in other
14 jurisdictions.

15 QUESTION: In Israel, for example, if you have a
16 -- a criminal prosecutor, it looks just like our
17 prosecutor. My understanding is that the one difference
18 is that a victim could go to court to force the prosecutor
19 to bring a prosecution. So does that mean now under this
20 statute, because of that one difference, all prosecutors
21 in Israel are open to this -- our tribunals under this
22 statute?

23 MR. LYNCH: Well, I -- I think that the -- the
24 question of whether a victim is an interested person
25 arises --

1 QUESTION: No, no. I'm not -- that's not the
2 part I'm getting at. I am saying it's easy to think of
3 people whom, when we look at them, they are precisely like
4 a human being in the U.S. Attorney's office, and
5 everything they do every day is just like a U.S. Attorney,
6 but for one thing, that somebody who wants a prosecution
7 to be brought can get a court to review a decision, no
8 prosecution. Now, I'm asking you if that single
9 difference is sufficient to translate this into a tribunal
10 under the act.

11 MR. LYNCH: Your Honor, I believe that the
12 answer is that the court to which you can go in Israel and
13 ask them to direct the prosecutor to bring a prosecution
14 has to be a tribunal within the meaning of the statute.

15 QUESTION: No. Now, you're not getting my
16 questions.

17 MR. LYNCH: But the prosecutor is not a
18 tribunal.

19 QUESTION: I don't want to just repeat it again.
20 Did you not understand the question? The question is I'm
21 imaging a person like a U.S. Attorney, exactly the same,
22 and there's only the one difference I mentioned. Somebody
23 can go ask a judge to say did he abuse his discretion in
24 not bringing this RICO case. Okay? That's the only
25 difference. Now, I'm asking you if we had such a person,

1 does that make him a tribunal under the act.

2 MR. LYNCH: A person -- the prosecutor would not
3 be a tribunal.

4 QUESTION: Fine. If that's so --

5 MR. LYNCH: The --

6 QUESTION: -- and I agree with you -- how does
7 this particular tribunal differ from the one I just
8 described? I don't mean a tribunal. How does the
9 commission differ from that prosecutor I just described?

10 MR. LYNCH: Because under the European rules of
11 procedure which I can't relate to Israel, but I can relate
12 to the United States --

13 QUESTION: Forget Israel. I might even be wrong
14 about Israel.

15 MR. LYNCH: Under the --

16 QUESTION: You've got my question.

17 MR. LYNCH: Under the --

18 QUESTION: And I want to know how they differ
19 from what I just said.

20 MR. LYNCH: Under the European rules of
21 procedure, Justice Breyer, the -- the European Commission
22 has to consider the facts, has to apply the law to the
23 facts, has to reach a decision which is reviewable by a
24 court. This is not --

25 QUESTION: And that differs from my case, which

1 was our U. S. Attorney who can be brought to court for not
2 prosecuting on those kinds of grounds. You said it
3 doesn't apply to him, and now you're more or less
4 repeating what I said was the special feature of my
5 imaginary U. S. Attorney.

6 MR. LYNCH: Well --

7 QUESTION: So is -- you can elaborate on that or
8 give me another one too.

9 MR. LYNCH: I believe that the -- the process I
10 described is a classic example of quasi-judicial activity
11 by an administrative body. It would be an adjudication
12 under the Administrative Procedure Act.

13 QUESTION: The prosecutor has no authority on
14 his own to impose a fine. Right? He can just bring the
15 case to court, and I think what you're saying is that the
16 commission here does have authority on its own to take
17 action against a party. That -- now, that action that it
18 takes will be reviewable, but it can impose a fine or
19 require the -- the selling of some of the assets of the
20 company and so forth. Isn't that right?

21 MR. LYNCH: Yes. Yes, Your Honor.

22 QUESTION: That's very important. That's --

23 QUESTION: That's different. That's different
24 from what a prosecutor can do. He can't -- he can't do
25 anything on his own.

1 MR. LYNCH: He cannot do anything on his own.
2 He does not have the power to issue fines.

3 QUESTION: And so what is the difference there
4 between -- and I -- I'm serious about this question. What
5 is the -- what -- all my questions are serious.

6 (Laughter.)

7 QUESTION: But this is -- I don't know the
8 answer to this. What is the difference specifically
9 between the EU saying you pay \$10 million and the U.S.
10 Attorney saying we want him to pay \$10 million? What's
11 the difference there procedurally?

12 MR. LYNCH: The -- the order of the EC, the
13 order of the commission is a final, enforceable judgment
14 in Europe unless the party, the respondent to that order,
15 takes an appeal to the community courts. And that would
16 be the same as an order of the NLRB or an order of one of
17 our administrative agencies which is enforceable but
18 subject to judicial review. I don't want to --

19 QUESTION: When they review it, do they give a
20 leg up to the commission?

21 MR. LYNCH: When -- when the -- the
22 commission --

23 QUESTION: If it goes to court, is the -- is the
24 issue in the court in the EU an issue like review of the
25 NLRB, that the NLRB wins, unless they're quite wrong, or

1 is it like a court reviewing a decision of the Antitrust
2 Division to bring a tying case where the court will say,
3 we'll make up our mind on our own? You know, they know
4 something about it, so do we. Which is it?

5 MR. LYNCH: It -- I think it's some of both. If
6 the -- if the --

7 QUESTION: It has to be either one or the other.
8 They -- they either have to give deference to the agency,
9 as we did, or they're making this decision on their own.
10 And so --

11 MR. LYNCH: If the agency purports to be
12 deciding on a question of law, like is this tying, they
13 would review the decision of the agency the same way a
14 U.S. court would and say, whether or not this is tying
15 under article 82 or article 81, is ultimately a decision
16 of law and ultimately the community courts have the last
17 word on it. If they were making a decision, was the
18 procedure that was followed here adequate, did the -- did
19 the commission properly weigh the evidence, did it pursue
20 the right evidence, they would give -- they would give
21 deference to the commission's ability to decide how to
22 conduct its process. So there's a great deal --

23 QUESTION: How about fact-finding?

24 MR. LYNCH: The fact-finding process is -- I'm
25 -- I'm at a loss to relate it to U.S. process. There's

1 not like a substantial evidence --

2 QUESTION: No, I'm not talking about process.

3 I'm saying does the reviewing court defer to the

4 commission's finding of fact.

5 MR. LYNCH: It -- I think it clearly defers, but

6 I can't find that standard of review because the

7 commission has been reversed in the Gregarian case, for

8 example, which is cited in the briefs. The commission has

9 been reversed because the facts before it, according to

10 the reviewing court, established a violation --

11 QUESTION: My impression, which only comes from

12 the newspapers, is that the courts there are taking a much

13 more active role and it's becoming like they're vis-a-vis

14 the Antitrust Division and it's not like vis-a-vis a

15 commission. But is that -- my --

16 MR. LYNCH: I would -- I would say --

17 QUESTION: I'm wrong on that.

18 MR. LYNCH: -- with -- with all respect, I would

19 say it would be like this Court vis-a-vis the district

20 courts or vis-a-vis administrative agencies as opposed to

21 prosecutors.

22 And where -- where I started on this point was

23 that in enacting 1782, Congress did not undertake to

24 dictate Europe or to any other country in the world

25 exactly our standards of administrative procedure.

1 QUESTION: But did it -- did it undertake to
2 dictate to us that we should exceed our standards? I
3 mean, I can understand the -- the argument that you -- you
4 mustn't, in effect, limit the -- the discovery here by the
5 discovery that they could have had over there because who
6 knows what it -- I mean, we're just not experts in that,
7 and it's hard to find out.

8 We are, however, at least closer to being
9 experts on what American law would provide. Is it
10 plausible to think that Congress was, in -- in extending
11 this great example to the world, extending an example
12 which would provide even more generous discovery than
13 American law would in a domestic antitrust proceeding?

14 MR. LYNCH: Your Honor, I think that is a false
15 premise here. The difference between what's going on in
16 Europe and what's going on here is that Europe gave AMD
17 one and only one Europe-wide remedy. In the United
18 States, we could have brought a private action in the
19 district court for these very same violations. In Europe,
20 our only Europe-wide remedy was to go to the commission.
21 The European authorities as --

22 QUESTION: So, in other words, you're simply
23 saying we can't -- we could sue here. We can't sue there.
24 Therefore, you've got to, in effect, give us the right of
25 a litigant here even though we are not there in a

1 litigant's position.

2 MR. LYNCH: With all respect, I would say we are
3 in a litigant's position. Under our interested party
4 rules --

5 QUESTION: But not in -- not in the sense of
6 being a party as -- as you would be if you brought a
7 private antitrust complaint. That's all I meant.

8 MR. LYNCH: In the sense of being a party in
9 that our application has the same standing under European
10 procedural law as a complaint would have here, that when
11 we file that complaint, the commission ipso facto owes us
12 an obligation to make an adjudication. It cannot, just as
13 a matter of discretion, disregard our complaint. It must
14 make a reasoned decision applying law to the facts. It
15 must consider the evidence.

16 QUESTION: Okay. So you, in effect, I think are
17 telling me, yes, we'll accept the position that we
18 shouldn't be better off than we would be in the United
19 States if you realize that we are in the position of an
20 American plaintiff right now. That's -- that's your
21 answer.

22 MR. LYNCH: I'm -- I would say it slightly
23 differently, that whether you call us in the position of
24 an American plaintiff right now or whether you say there
25 is no direct analogy, we are a litigant in any practical

1 sense of the word.

2 The commission in its brief acknowledges that
3 when you get down to that last step, they are acting as a
4 tribunal. They are making a reasoned determination.
5 They're -- they're doing everything that our Due Process
6 Clause --

7 QUESTION: Do they -- do they --

8 QUESTION: May I go --

9 QUESTION: Must they consider -- and I -- I
10 think this is along the lines of what Justice Souter is
11 asking, so I hope I'm not interrupting. Must they
12 consider any evidence you give them?

13 MR. LYNCH: They must.

14 QUESTION: Or can they say that it's -- that --
15 that there's a -- certain relevancy rules that -- that you
16 must adhere to?

17 MR. LYNCH: Well --

18 QUESTION: Because what's happening, it seems to
19 me, is that you want to force them to consider things they
20 don't want to consider.

21 MR. LYNCH: Well, I -- with all respect, I don't
22 know that they've ever said they don't want to consider
23 it. The indication we have is that they don't have the
24 resources as -- as an enforcement agency to go after this
25 material which we think would be highly relevant.

1 But the answer to your question is, according to
2 the -- to the court of first instance, the European Court
3 of Justice, they must consider the evidence we put before
4 them. Like a district court, they could presumably say
5 this is irrelevant evidence, but they --

6 QUESTION: But haven't they, in effect, said
7 that? They said, please, we don't -- we don't want this.

8 MR. LYNCH: They have not said that. They have
9 -- the -- the commission tells us -- and I believe counsel
10 has indicated -- if we present the evidence, they have an
11 obligation to consider it and they have an obligation to
12 deal with that in their decision. And they must make a
13 reasoned decision which is reviewed by the court --

14 QUESTION: But they don't want it..

15 QUESTION: Isn't the --

16 QUESTION: But they don't want it. They've also
17 said they don't want it. They said, if you give it to us,
18 we'll look at it, we have to, but frankly, we'd rather you
19 go away. Isn't that what they've said?

20 (Laughter.)

21 MR. LYNCH: No -- no one connected with the
22 commission has said that to us. And the -- the
23 commission's briefs I guess are capable of that
24 interpretation in this Court. But what -- what the staff
25 working with us says is that they don't want to ask for it

1 because of whatever decision they'd make. But they have
2 no have no objection to us asking for it. We told them
3 about this proceeding before we filed it. We kept them
4 informed every step of the way.

5 To go back --

6 QUESTION: May -- may I go back to the -- to the
7 one point of your answer that -- that continues to bother
8 me? And it may be that I -- I don't understand something.
9 So that's what I want you to help me on.

10 I thought their argument was that when you say
11 your present position is just like the -- or is the
12 position of a litigant, the difference between you as a
13 litigant over there and you as a litigant here is -- is a
14 difference in -- in effect, in responsibility. You at
15 least at not supposed to bring an irresponsible complaint
16 in the United States. You can be sanctioned if you do.
17 They, I think, are implying that you don't have that
18 obligation of responsibility over there and therefore
19 simply by filing a complaint, without anything more, you
20 get a free ticket to discovery, whereas your ticket to
21 discovery if you were suing in the United States, is not
22 free because you would have to meet a certain threshold of
23 responsibility before you bring it, and therefore your
24 positions aren't the same.

25 What is the answer to that?

1 MR. LYNCH: There is no rule 11 for any
2 proceeding brought in the European Commission. They have
3 no direct rule 11. They have great power over the firms
4 that come before them, and they're perfectly capable of
5 protecting themselves from frivolous activity.

6 I think the difference between the commission
7 and us is this. When I finish or when the last person to
8 speak finishes, this Court will say the matter stands
9 submitted. The commission is arguing, in effect, that
10 it's not litigation until the commission says the matter
11 stands submitted. And there's this momentary point when
12 they're a tribunal and the door slams shut. Then the
13 court of review says, you didn't come to the commission
14 and offer your evidence.

15 It's taken us nearly 3 years to -- to get access
16 to this evidence, which we wish to put before the court.
17 We are like any litigant in the United States who wants to
18 say that the body charged with enforcing the labor law,
19 the body charged with enforcing the occupational safety
20 law, has not properly conducted its due diligence. We
21 have a proprietary interest in our own right of coming
22 forward and presenting persuasive evidence to the --

23 QUESTION: Mr. Lynch, can I ask you this
24 question?

25 MR. LYNCH: Yes, sir.

1 QUESTION: It's prompted by Mr. Waxman's
2 argument. Because you filed a complaint, you say you're
3 an interested person. Is that right?

4 MR. LYNCH: We can't be an interested person
5 just by filing a complaint. There are -- there are the
6 equivalent of --

7 QUESTION: Why not?

8 MR. LYNCH: -- of standing requirements --

9 QUESTION: I was -- I was going to ask you, what
10 if you just filed an affidavit with the district court
11 that you intended to file a complaint?

12 MR. LYNCH: We would --

13 QUESTION: Would you then be interested?

14 MR. LYNCH: We believe that -- that the minimum
15 that would be required is some proceeding underway.

16 QUESTION: So you would agree that there is some
17 latitude for construing just the scope of what an
18 interested person is.

19 MR. LYNCH: Well, yes. I think the interested
20 person has to have a -- a place as of right in the
21 proceeding which -- in which the aid is sought, whether
22 that's a district attorney, whether it might be a victim
23 in Israel, whether it's a competitor. But under European
24 law, not just anybody can walk in and file these
25 complaints. You have to be a competitor or a consumer.

1 They're exactly the same standing requirements that we
2 have under our antitrust law. And -- and the commission
3 has issued regulations which are quite clear, that -- that
4 you must have standing to bring such a complaint.

5 Now --

6 QUESTION: So you have to -- you would have to
7 look to foreign law to determine whether the person is an
8 interested party.

9 MR. LYNCH: I think that's a U.S. law question
10 under 1782.

11 QUESTION: But there has to be a pending
12 proceeding, you're saying, because you obviously can't be
13 a party if there's no proceeding yet.

14 MR. LYNCH: Well, again, to take some of the
15 cases like Justice Ginsburg's case in the D.C. Circuit, a
16 proceeding could be in reasonable contemplation when an
17 official file has been opened to investigate. I think
18 that's what --

19 QUESTION: Then -- then you're saying you could
20 have come here even before you filed the -- the complaint
21 with the commission.

22 MR. LYNCH: I'm saying that until you file the
23 complaint with the commission, there is not sufficient
24 showing of a reasonable probability of a proceeding for
25 anyone to claim -- anyone to claim -- that they are an

1 interested party. I don't believe that the commission,
2 the European Commission, could come in and say --

3 QUESTION: No, but the contemplation of
4 proceeding has got to be present. Proceeding can be in
5 the future.

6 MR. LYNCH: And there has to be some official
7 act that --

8 QUESTION: And that's different from United
9 States law.

10 MR. LYNCH: That --

11 QUESTION: In that respect, you are not a
12 litigant in -- in the same sense that you would be
13 required to be a litigant for discovery here.

14 MR. LYNCH: Those were the words I was trying to
15 get out in answer to your earlier question, that the Ninth
16 Circuit seemed to feel that although the process in Europe
17 is different than it is in the United States and therefore
18 it might not be exactly right to say we're a party in the
19 context of U.S. expectation, we are in a -- we're on a
20 conveyor belt that inevitably turns us into a party if the
21 process continues in its ordinary course. We don't --
22 there's nothing we have to do to make this into a --

23 QUESTION: Unless -- unless you get your
24 discovery and say, well, we've learned a lot of
25 interesting things about the other company. We don't care

1 about an antitrust suit now. We've got what's valuable to
2 us. We're not going to initiate a proceeding. That's
3 what they're worried about.

4 MR. LYNCH: But that could happen in -- in any
5 U.S. lawsuit. I mean, the notion that cases can be
6 settled --

7 QUESTION: You've got rule 11. You don't have
8 rule 11 when you're merely in -- in the EC and when you're
9 merely in contemplation of litigation.

10 MR. LYNCH: Well, with all respect, the rule 11
11 -- the notion that we don't have an obligation to the
12 commission to proceed responsibly implies that without
13 rule 11, litigation in the United States would have no --
14 that -- that lawyers would be free to do whatever they
15 want to do. The -- the -- it's quite clear under the
16 commission's rules and regulations that there is a
17 responsibility.

18 QUESTION: Okay. But is that a responsibility
19 that they can enforce against you in any practical sense
20 before you have initiated a proceeding with them? In
21 other words, in the case that they're worried about, you
22 -- you get American discovery to learn interesting things
23 that as a competitor you want to learn and you drop it
24 there. Does the EC have a -- have a means of, in effect,
25 calling you to book for that?

1 MR. LYNCH: Well, I think the -- I think the
2 answer is there's no rule. I can't point to a rule that
3 says that, but the EC has plenary jurisdiction to regulate
4 AMD and other firms doing business within the -- within
5 the community and they have -- they have the power --

6 QUESTION: So they can go against them as
7 regulated industries quite apart from their litigant
8 status.

9 MR. LYNCH: But -- but --

10 QUESTION: Is -- is that --

11 MR. LYNCH: Well, I -- I would just say it's
12 like the inherent power of the court to find contempt that
13 -- that I don't think the EC has had this problem

14 QUESTION: Yes, but we don't have contempt power
15 if you're not in court, and that's the problem

16 MR. LYNCH: But you -- but we are in court.
17 When we file our complaint with the EC, we're as in court
18 as --

19 QUESTION: We're talking about the situation
20 before you file a complaint, the situation in which you
21 are contemplating the complaint.

22 MR. LYNCH: I -- I --

23 QUESTION: There's nothing yet pending.

24 MR. LYNCH: I'm sorry. I misunderstood your
25 question. In our -- in our view if you have not filed a

1 complaint with the commission, you're not an interested
2 person and there is not a sufficient likelihood of a
3 proceeding for 1782 to apply. There has to be in this
4 context --

5 QUESTION: So you're adopting a pending
6 proceeding rule then.

7 MR. LYNCH: We are saying that whether you call
8 that complaint a proceeding, which -- which certainly
9 Intel and the commission say it is not, or whether you
10 call it --

11 QUESTION: But there's got to be something
12 pending --

13 MR. LYNCH: -- something leading to a
14 proceeding, that it is a sufficient -- it is sufficiently
15 proximate to a proceeding, and I think that was the way
16 the Ninth Circuit tried to sort of straddle the problem

17 QUESTION: Thank you, Mr. Lynch.

18 MR. LYNCH: Thank you.

19 QUESTION: Mr. Minear, we'll hear from you.

20 ORAL ARGUMENT OF JEFFREY P. MINEAR

21 ON BEHALF OF THE UNITED STATES

22 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

23 QUESTION: Mr. Minear, would -- would you take
24 up where -- where Mr. Lynch left off? Do you take --
25 would you take the position that an interested party has

1 got to be a party at least who has filed a complaint?

2 MR. MINEAR: Mr. Chief Justice, and may it
3 please the Court:

4 Yes, we would agree with the position that an
5 interested party does need to have a pending proceeding.

6 QUESTION: This interested person and the
7 proceeding is initiated doesn't have to be the judicial
8 proceeding or unless I was wrong in --

9 MR. MINEAR: If I can go back and -- and try and
10 clarify my answer. There's two questions here really.
11 First of all, is there a proceeding in which -- before a
12 foreign tribunal, and is there an interested person?

13 In our view, a private person becomes an
14 interested person when there is a proceeding that is going
15 forward. The -- in the case of the tribunal itself, it
16 can, under section 1782, request this information even
17 though no complaint has yet been filed and we think that
18 that is the way that we ensure that there are not actions
19 brought by people who have not taken any action but are
20 simply seeking discovery without any proceeding being
21 present.

22 QUESTION: And you say tribunal, you're talking
23 about the EC because the court of first instance and the
24 ECJ would not be asking for material.

25 MR. MINEAR: That -- that's correct.

1 And I'd like to make three basic points.

2 QUESTION: Before you do that, explain what
3 you've just -- what you've just said. It seems to me that
4 there is no proceeding before a tribunal here yet.

5 MR. MINEAR: We disagree with that, Your Honor.

6 QUESTION: You -- you think that -- that the --
7 the commission is a tribunal even in the preliminary
8 stages when it's investigating and -- and is -- has -- is
9 not adjudicating?

10 MR. MINEAR: Yes, we think it -- it is and we
11 can point to several reasons why that is the case.

12 First of all, a textual reason, that the statute
13 itself, section 1782, makes reference to proceedings
14 before a foreign tribunal, including criminal
15 investigations before formal accusations.

16 QUESTION: Yes, but that's -- that's -- there
17 are criminal investigations in most countries other than
18 Britain and the United States where the investigating
19 magistrate is a judge.

20 MR. MINEAR: That's correct.

21 QUESTION: Of course, they're a tribunal. The
22 key things here is that the people here are investigators
23 who do not think of themselves as judges. They are not
24 judges. And in addition, the proceedings are not
25 adversarial, nor are they adjudicative in any sense. And

1 that is all the difference in the world between -- you're
2 talking -- you think you could bring a -- all we have is
3 an investigation in France by the police judiciaire.

4 MR. MINEAR: No, Your Honor.

5 QUESTION: And suddenly we're going to -- we're
6 going to start getting all -- I mean, no. It's a big
7 difference whether it's a magistrate, a -- you know, a
8 judge.

9 MR. MINEAR: Your Honor, I think part of the
10 confusion here is the procedures that are actually in
11 place by the European Commission. In that regard, I
12 suggest that the Court take heed of the notice concerning
13 the filing of complaints that's cited on page 13 in note 3
14 of AMD's brief. That's an 80-paragraph document that
15 describes the procedures that the European Commission
16 follows --

17 QUESTION: Well, I read through some, my clerk
18 read through some, and I ended up by thinking there are
19 some that are rather like the FTC, but then there are a
20 certain number that are really very different. And the
21 thing that struck me as pretty critical is just what I
22 said. They do not think of themselves as judges. They
23 are -- do not think of what they are doing as
24 adjudicatory, and they don't even have a way of walling
25 off, as we do, the investigators from the adjudicators.

1 Now, there are certain similarities too. But
2 where we have similarities and major differences, maybe we
3 should pay attention to what they want to call themselves.

4 MR. MINEAR: Perhaps, but I would point out the
5 similarities to an adjudication before I -- I move on to
6 answer that question. First of all, a party that files a
7 complaint does not simply send a letter in. Instead, they
8 must use the complaint form that's described. They must
9 set forth all of the information that they have available,
10 and they must establish that they are an interested party.
11 A legitimate party I think is the term that's used, which
12 is essentially the same as a standing requirement.
13 There's then proceedings in which they participate before
14 the European Commission, ultimately leading to the
15 commission issuing a letter indicating a preliminary
16 decision. They're allowed to respond to that as well.
17 And at that point, the commission then must make a choice.

18 QUESTION: Proceedings in which they participate
19 before the commission. How do they participate?

20 MR. MINEAR: Primarily by submitting written
21 documents, by responding in written form. It's my
22 understanding there is no hearing before the commission in
23 that first stage, but ultimately there is a decision
24 that's produced by the commission that is -- must include
25 reasons for their decision, and that is judicially

1 reviewable.

2 Now, that entire process bespeaks, to a
3 considerable extent, of an adjudicative type proceeding.
4 But even if it's not, it's at least in preparation of what
5 will then be one of two certainly adjudicative
6 proceedings. One is the review by the court of first
7 instance, or in the alternative, if the commission decides
8 to go forward with the complaint, a proceeding in which a
9 statement of objections is then lodged against Intel.

10 My point in describing all this is just to
11 emphasize that Congress used very broad language here in
12 terms of a proceeding before a foreign tribunal because it
13 realized that there's a vast and uncatalogued variety --

14 QUESTION: It sort of sloughed over a point I
15 think was pretty critical. I mean, if the commission
16 itself is not proceeding -- not a tribunal, which I -- you
17 dispute, but if I were to disagree with you about that, I
18 would certainly agree with you that the court of first
19 instance and the further reviewing courts are. But there
20 you run into the statement in that D.C. case that I
21 referred to earlier which there must be reliable
22 indications of the likelihood the proceedings will be
23 instituted within a reasonable time. And as to those
24 further court of first instance, the reviewing court and
25 over in the ECJ, then -- then -- do they meet that

1 criterion?

2 MR. MINEAR: Well, that's a question, it seems
3 to me, that goes to the district court's discretion,
4 determining whether or not to allow the evidence. That's
5 not a statutory criteria that you're citing to, but rather
6 I believe that the D.C. Circ was indicating a matter that
7 informs the discretion. The statute --

8 QUESTION: And it would be within this statute
9 even if the only indication we had whichever -- there
10 would ever be a case is there's 1 chance in 50 that there
11 will be a case 18 years from now.

12 MR. MINEAR: Well, it's --

13 QUESTION: That would fall within this statute
14 and it's just some kind of discretion that keeps it out.

15 MR. MINEAR: The district court has to make that
16 judgment of whether or not the action --

17 QUESTION: Even in the example I just gave?

18 MR. MINEAR: Well, in the example you just gave,
19 there's been a complaint that's been filed and one of two
20 things -- I can say one of three things will happen.
21 Either a complaint will be denied -- ultimately will be
22 denied, in which case there will be an action before the
23 court of first instance, or else there will be the -- the
24 commission will go forward with the complaint, in which
25 case there will certainly be an adjudication against

1 Intel, or AMD would withdraw the complaint for some reason
2 that we don't know about. Those are the only three
3 alternatives. So certainly under the decision of the D.C.
4 circuit, I think that a -- proceedings are in reasonable
5 contemplation, or at a minimum, at least that issue ought
6 to be placed before the district court in the exercise of
7 its discretion.

8 QUESTION: You want 800 judges to review this
9 even in the extreme case I mentioned, and unless -- as
10 long as you can find some in your favor, you can just go
11 file a complaint over there and get all your competitors'
12 documents and put everybody to about \$5 million or \$6
13 million worth of costs, et cetera.

14 MR. MINEAR: By no means at all, Your Honor. As
15 we indicate in our brief, we believe that rules of --
16 supervisory rules of practice can be developed by the
17 courts to contain and channel the district court's --

18 QUESTION: And what's our authority to do that?

19 MR. MINEAR: The authority is the type of
20 authority that is described in Thomas v. Arn. It's simply
21 that the Court has -- has authority to supervise the
22 activity and provide guidance to district courts in the
23 exercise of their discretion.

24 QUESTION: Yes, but how -- how are we to know
25 what guidance to provide without a great deal of

1 experience one way or another in -- in the lower courts?

2 MR. MINEAR: Well, we agree with that as well,
3 and we think that type of guidance at this stage would be
4 premature. We suggested the Court take this case to
5 resolve the circuit conflict on a question of statutory
6 construction.

7 QUESTION: And so now we go back to the 800
8 district judges and their discretion even in the kind of
9 rather extreme case that Justice Breyer describes.

10 MR. MINEAR: Well, Your Honor, the district
11 courts have been at work at this area and there are about
12 20 cases now over the past 40 years in -- that have
13 construed section 1782, and they -- those cases do provide
14 guidance. We think that the question -- the primary
15 question this Court needs to answer is, is there a rule of
16 foreign discoverability? And we submit that there's no
17 such rule evident on the basis of the statute --

18 QUESTION: But it's -- it's an odd reading of
19 the statute that we have these discoveries for use in a
20 proceeding in a tribunal and the tribunal said it isn't
21 for our use. It's counterproductive.

22 MR. MINEAR: Well, Your Honor, I think --

23 QUESTION: How can that be for use if it's
24 counterproductive?

25 MR. MINEAR: Your Honor, we need to pay close

1 attention to what the commission said and what it did not
2 say. Our view is if the commission does not want this
3 information, then that's a very good reason for the
4 district court to deny discovery in this case. The court
5 has not said -- the commission has not said it would not
6 use this information, which is quite a different matter.
7 If the commission said that it will simply not use this
8 information, then that is a reason why section 1782 should
9 not apply. The information would simply not be used in
10 the proceeding. But we think that the -- the
11 circumstances here are far less certain.

12 I should point out that this matter has gone
13 back down. The issue -- a mandate was issued while the
14 petition for certiorari was pending. And the magistrate
15 judge has issued a preliminary order that the district
16 court has not reviewed yet, which has limited the amount
17 of discovery that would be available. And in that course
18 of that decision, the magistrate judge did point out that
19 it was not clear whether this information -- whether the
20 commission had not made clear whether or not the
21 information would be wanted or used by it. That was --
22 there was uncertainty --

23 QUESTION: Now, given their brief in this, which
24 seems to me could not be more clear --

25 MR. MINEAR: The --

1 QUESTION: -- and your belief that looked what
2 happened, what we have even this court granting some
3 discovery, even though the principle is they shouldn't --

4 MR. MINEAR: But that issue --

5 QUESTION: -- then what are we supposed to write
6 that makes real what you --

7 MR. MINEAR: Your Honor, first of all, I think
8 you -- you need to resolve the issue of statutory
9 construction on the rule of the question of foreign
10 discoverability. And we've explained our views in the
11 brief on that.

12 QUESTION: Thank you, Mr. Minear.

13 Mr. Waxman, you have 3 minutes remaining.

14 REBUTTAL ARGUMENT OF SETH P. WAXMAN

15 ON BEHALF OF THE PETITIONER

16 MR. WAXMAN: Thank you, Mr. Chief Justice.

17 The brief, amicus curiae of the European
18 Commission, states that what it wants is reversal. It
19 wants reversal of the decision that sent this back for a
20 discretionary, 1 of 800 judges' factor-by-factor
21 balancing.

22 Now, everybody considers -- Justice Souter, with
23 respect to your question about how difficult it might be
24 to determine foreign discoverability, everybody agrees
25 that's a relevant factor. So the question is going to

1 come up in even more instances if you don't announce a
2 rule, either by construing interested person or proceeding
3 or for use in, that somehow channels the discretion of
4 district judges.

5 Justice Kennedy, pages 36 and 37 and
6 particularly footnote 18 of our blue brief provide, we
7 think, the authority for instances. But it's basically
8 saying the way you do when you decide cases involving
9 discovery under rule 26. There are certain instances in
10 which, since we know what the statute -- there's no doubt
11 about the purpose of the statute, it will always be an
12 abuse of discretion.

13 Now, with respect to the question of whether
14 this is isn't a tribunal or how soon a tribunal has to
15 occur, AMD acquiesced, and this is a point made in
16 footnote 2 of our reply brief on page 3. They acquiesced
17 -- and this Court granted cert on the second question
18 presented -- on the assumption, as the lower court found,
19 that there is no proceeding before a tribunal now.
20 Otherwise, the question of whether the D.C. Circuit's
21 interpretation of how soon it had to be or the Second
22 Circuit's interpretation would have been presented.

23 Similarly, this morning is the first time that
24 -- that AMD has argued that it was in -- that it is, in
25 fact, a litigant. It has always argued that you shouldn't

1 read the interested person to require litigant even in the
2 private context because it's only in the title. It's only
3 showered throughout the legislative history, but it's not
4 in the text.

5 But the question of when something is a tribunal
6 or when it isn't may determine, as this Court's questions
7 this morning suggest, lots of very, very fact-specific
8 determinations that have to be examined perhaps on a case-
9 by-case basis, although we would argue that where the,
10 quote, tribunal itself says we're not, a court ought to
11 accept it.

12 But if you simply interpret interested person or
13 interpret for use in in the context of a request by a
14 private party before there is any proceeding, that where
15 the request is by an entity that has no rights of
16 discovery at all, not to documents, not to testimony, not
17 at the first stage, not at the second stage, and not in
18 any subsequent judicial proceeding, we can simply cut this
19 off. It will always be abuse of discretion to come to the
20 United States and try and get discovery when you're trying
21 to aid a tribunal that doesn't now and never will allow
22 you to get any discovery.

23 CHIEF JUSTICE REHNQUIST: Thank -- thank you,
24 Mr. Waxman.

25 The case is submitted.

1 (Whereupon, at 12:05 p.m., the case in the
2 above-entitled matter was submitted.)
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